IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAY FOSTER, PLLC — APPELLANT

VS. — CASE NO. 2014-WC-01521-COA

THERESA MCNAIR — APPELLEES

Appeal to the SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF OF APPELLANT

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Oral Argument Not Requested

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Jay Foster, Attorney for the Appellant.
2. Paul Howell, Attorney for the Insurance Carrier.
3. Theresa McNair, Appellee.

Jay Foster
Attorney for the Appellant

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issues presented for review is:

STATEMENT OF THE CASE

A. Course of Proceedings And Disposition In the Court Below

References to the Record Excerpts submitted by Jay Foster, P.L.L.C. (hereinafter Foster or I or me) shall be by notation. (R. Ex.). References to the Clerk's papers will be by the designation (C.P., Vol., p.), meaning the Clerk's Papers, Volume, and page.

The Appellee, Theresa McNair (hereinafter McNair), hired Jay Foster to represent her on two worker's compensation claims against the same employer. The Administrative Law Judge (hereinafter ALJ) found that Foster was entitled to be paid his 25% attorney's fees. The Mississippi Worker's Compensation Commission (hereinafter Commission) reversed the ALJ and awarded Foster no money for attorney's fees on McNair's second injury.

B. Statement of the Facts

1. It is undisputed that the bill for legal services rendered has already been filed with the Commission. (C.P., Vol. II p. 261-269).
2. It is undisputed that the work was performed. (C.P., Vol. II pp. 261-269).
3. It is also undisputed that Jay Foster represented McNair in regards to **both** worker's compensation injuries as Foster filed the following for both injuries: Petition to Controvert, Notice of Service of Discovery, Request for Production of Documents, Request for Admissions, and Interrogatories. (C.P., Vol. II, p. 277-301 and C.P., Vol I, p. 34).
4. It is also undisputed that McNair signed a retainer agreement with the Appellant, Jay Foster, P.L.L.C. (C.P., Vol. I, p. 113-114). In the event McNair terminated the attorney-client relationship, the retainer agreement shows that McNair was required to pay Jay Foster, P.L.L.C., $280.00 per hour for legal services rendered. McNair did not pay Jay

Foster, P.L.L.C., anything. As a result, Foster filed a Motion for Summary Judgment regarding attorney's fees and McNair failed to file a response. (C.P., Vol. I, p. 130).

5. Subsequently, on March 11, 2014, a hearing on Foster's Motion for Summary Judgment was held and the ALJ granted the Motion and found Foster should be paid. (C.P., Vol. II pp. 179-180, 182-185).

6. **Before** the claimant's **second** injury, the **first** injury was settled. However, on February 17, 2012, **after** the first injury, the claimant sustained a **second** injury with the same employer.

7. Therefore, on March 14, 2012, Paul Howell, insurance counsel (hereinafter Howell) sent Foster a letter and advised the settlement for the first injury was off "unless you would be willing to include the intervening [second] injury." (C.P., Vol. II, p. 209).

8. On March 29, 2012, I spoke with the claimant and advised her that the insurance company would not settle the first case for the agreed upon amount of $25,000.00 with this second accident pending so "we'll settle both after mmi." (C.P., Vol. II, p. 261).

9. After this date, there are ***numerous*** emails and telephone calls between Jay Foster and the claimant about the second accident. (C.P., Vol. II, p. 261-268). I will highlight just a few. On May 31, 2013, I advised the claimant that since Dr. Winters told her she needed a "desk job" then the employer "can't accommodate her since it's been over 1 month since she took the restrictions to them." (C.P., Vol. II, p. 266). Subsequently, on June 24, 2013, the claimant and I were discussing the settlement demand and she told me that "she wants to get dr to put future med [medical] care in writing BEFORE accepting any settlement. She will eb [email back] by tomorrow." (C.P., Vol. II, p. 267).

10. On May 3, 2012, the employer and carrier filed a Motion to Consolidate both of the

worker's compensation cases. As a matter of fact, this Order was signed by Paul Howell and Jay Foster. (C.P., Vol. I, p. 146-149 and C.P., Vol. II, 210-213).

11. On May 10, 2012, Jay Foster sent an email to Paul Howell about the Motion to Consolidate the cases and stated, "I read your Motion. If you want to just send me an Order consolidating the cases, I'll sign off on it." (C.P., Vol. I, p. 149 and C.P., Vol II, P. 213).

12. On May 7, 2012, and May 15, 2012, Jay Foster sent emails to the claimant about her second injury. On May 18, 2012, Foster received emails from the claimant about her second injury. (These emails were not attached as it may violate the attorney-client privilege. These emails are reflected in the itemized bill which is located at (C.P., Vol. II, p. 262).

13. On August 3, 2012, Howell emailed Foster and requested a settlement demand. (C.P., Vol. II, p. 214).

14. On August 5, 2012, Foster emailed Howell and asked, "Did she get released on the second injury? If so, can you email me the medicals on it, including the final report?" (C.P., Vol. II, p. 215).

15. On August 6, 2012, Howell emailed Foster and said, "I have not yet received a final report, however it should be getting close. My clients are wanting to see about settling this case under the assumption that the claimant can't come back to work at the nursing home." (C.P., Vol. II, p. 216).

16. On August 15, 2012, Foster emailed Howell and said, "I think I can probably get her to agree to that. If you get that report can you email it to me so I can send the demand?" (C.P., Vol. II, p. 217).

17. On August 21, 2012, Howell emailed Foster and said, "I will send you the final report upon receipt. Incidentally, the report seems to be held up since the claimant missed her August 1, 2012, meeting with Dr. Winters. Please ask her to follow up with Dr. Winters as soon as possible since we are voluntarily paying temporary total disability at present." (C.P., Vol. II, p. 218).

18. On August 29, 2012, Howell sent his Notice of Appearance to Jay Foster for the second injury. (C.P., Vol. I, p. 32-33).

19. On August 30, 2012, Foster emailed Howell and said, "Did you get this report [final report for the second injury from the doctor] so I can send the demand?" (C.P., Vol. II, p. 219).

20. On September 6, and September 13, 2012, Foster emailed Howell to follow up on the August 30, 2012, email. (C.P., Vol. II, p. 220-221).

21. On September 19, 2012, Howell emailed Foster to confirm the claimant's doctor appointment for the second injury. (C.P., Vol. II, p. 222).

22. On September 20, 2012, Foster emailed Howell and asked if this appointment was to get the final medical report for the second injury. (C.P., Vol. II, p. 223).

23. On September 20, 2012, Foster emailed the claimant about her final doctor appointment to make sure she went to it so we could get the final medical report for the s**econd** injury. (C.P., Vol. II, p. 160 and 224).

24. On September 24, 2012, Foster emailed Howell to let him know that the doctor canceled the final appointment because he wanted a mri first. Foster requested that Howell get this mri approved. (C.P., Vol. II, p. 161 and 225). This mri was for the **second** injury.

25. Instead of typing in all the emails, the rest of them are noted showing the extensive

conversations about the second injury and attempts to get the claimant the treatment she needed for it and to get the second injury case settled. There were also many emails and telephone calls between the claimant and Jay Foster regarding the claimant's treatment for the second injury. (C.P., Vol. II, p. 226-230) and itemized bill which details the date the emails or telephone calls took place (C.P. Vol. II, p. 261-269).

26. On October 29, 2012, in response to a status request, Foster advised the Commission that the claimant had a second injury and was not yet released from it. (For some odd reason, although this page was designated, I cannot seem to locate it in the record but the itemized bill reflecting the letter is located at C.P., Vol. II, p. 264).

27. On February 22, 2013, Paul Howell sent Jay Foster a letter and advised him to make sure the claimant went to her Functional Capacity Examination for ***both*** cases. (C.P., Vol. II, p. 164).

28. On May 24, 2013, Jay Foster received the proposed Order to consolidate the cases. (C.P., Vol. I, p. 146-149).

29. On May 24, 2013, Jay Foster received a letter from Paul Howell which stated, "Pursuant to your agreement to my Motion, enclosed please find a proposed Order granting consolidation of the claimant's two claims. " (C.P., Vol. I, p. 3, 146-149).

30. On May 28, 2013, the ***claimant (McNair)*** faxed from Office Depot in Gulfport, MS (228-832-9668 fax number) Jay Foster the final restrictions from Dr. Donnis Harrison for the ***second*** injury. (C.P., Vol. II, p. 231-232). Dr. Harrison was the doctor who treated the claimant for the ***second*** injury.

31. On May 17, 2013, Paul Howell sent Jay Foster a letter stating, "Please provide me with a settlement demand to conclude ***both*** of these claims as soon as possible." (C.P., Vol. II,

p. 233).

32. On May 31, 2013, Jay Foster emailed and mailed the **claimant** a copy of the demand letter for ***both*** injuries which was for $77,750.00. (C.P., Vol. II, p. 235-236). This demand letter was also faxed to Paul Howell. This is **way over** the settlement amount of $25,000.00 for the **first** injury.

33. On June 3, 2013, Howell faxed Foster and said, "I have been authorized to settle these ***claims*** for a total of $40,000.00." Again, this offer was way over the original settlement amount for of $25,000.00 for the ***first*** injury.

34. Why? Because the fact is, I represented the claimant on both of these cases.

35. On June 5, 2013, Foster emailed and mailed Howell a letter about the settlement of ***both*** cases and **copied the claimant (McNair) on the letter**. (C.P., Vol. II, p. 170-173).

36. On June 7, 2013, Howell faxed Foster a counter for $50,000.00 for the settlement of ***both*** cases. (C.P., Vol. II, p. 174).

37. On June 14, 2013, Foster filed a Motion for Extension of Time for ***both*** cases. (Although I designated this Motion, for some odd reason, this Motion was not included in the record but is reflected in my itemized bill located at C.P., Vol. II, p. 267).

38. On June 21, 2013, Howell faxed Foster a counter for $58,375.00. (C.P., Vol. I, p. 45).

39. On June 14, 2013, Jay Foster filed a Motion for Extension of Time since the cases were to be consolidated on both the 2008 injury and the 2012 injury. (While this was designated, for some reason the Commission did not appear to include it in the record submitted to the Court. It is reflected in my itemized bill (C.P., Vol. II, p. 267)).

40. On June 28, 2013, Foster filed a second Petition to Controvert for the ***second*** injury. (C.P., Vol. II, p. 277).

41. On June 28, 2013, Foster filed the discovery and faxed it to the carrier for the ***second*** injury. (C.P., Vol. II, p. 278 - note the date is marked by the Commission as 9/8/14 because this was attached as an Exhibit to a Motion - it was mailed to the Commission on June 28, 2013 and file stamped by the Commission on July 1, 2013). The Petition to Controvert for the second injury was faxed to the carrier the same day as the discovery, June 28, 2013. The Petition to Controvert was filed by the Commission on July 1, 2013. (C.P., Vol 1, p. 34)

42. It is undisputed that on July 1, 2013, the Mississippi Worker's Compensation Commission approved Jay Foster's contact for the ***second*** injury. (C.P., Vol. II, p. 304) and (C.P., Vol. I, p. 35-36). Please note that the Commission put an incorrect date on this letter of September 9, 2014. This is obviously incorrect as I had already withdrawn from representing the claimant over a year before this date.

43. On July 3, 2013, Howell filed the Answer to the Petition to Controvert for the ***second*** injury and sent it to Jay Foster. (C.P., Vol. I, p. 37-39).

44. On July 8, 2013, the claimant fired Jay Foster from ***both*** cases. (C.P., Vol. I, p. 117-118)

45. If Jay Foster did not represent the claimant on ***both*** cases, then why is she firing me from ***both*** cases?

46. The answer is obvious: the claimant fired me from ***both*** cases because she knew I represented her on ***both*** cases.

47. On August 2, 2013, the Administrative Law Judge assigned to ***both*** cases allowed Jay Foster to withdraw from ***both*** cases. The Administrative Law Judge assigned to ***both*** cases noted that Jay Foster had a lien for both cases. (C.P., Vol. I, p. 46).

48. If I do not represent the claimant on both cases, then why is the Administrative Law

Judge allowing me to withdraw from representing the claimant on ***both*** cases?

49. Furthermore, it is undisputed that an itemized bill for legal services rendered for both cases has been filed with the Commission. It is undisputed that Jay Foster, P.L.L.C., has not been paid for this bill.

50. Based on the above undisputed facts, it is clear that Foster represented the claimant on both cases throughout this litigation.

SUMMARY OF THE ARGUMENT

51. This case should be reversed since the Commission did not award Jay Foster attorney's fees for both cases as the ALJ did.

STANDARD OF REVIEW

52. Regarding attorney's fees, it is an abuse of discretion except where a trial court applies an erroneous legal standard or fails to follow the law such as failing to find a party is bound by the contract the party signed or failing to award fees per quantum meruit. *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 725 (Miss. 2002).

ARGUMENT

The Claimant Admitted Jay Foster Represented Her on *Both* Cases

53. While the Commission found the contract was not valid, the claimant thinks it is.

54. In fact, the claimant ***admitted*** that I represented her on both accidents.

55. A letter that I received from the claimant shows that she fired me from ***both*** accidents.

56. In fact, the claimant did not terminate my representation of her for ***both*** accidents until July 8, 2013. (C.P., Vol. II, p. 302-303). Specifically, in this July 8, 2013, letter, the claimant states, "I Theresa McNair no longer need your service and that's in reference to

my accident of 5/24/08 as well as 2/17/12."

57. Thus, if I do not represent the claimant on both accidents, then why is she firing me from representing her on ***both*** accidents?

58. Obviously, the reason she referenced the second accident is because we were both operating under the assumption that the first contract she signed with me was valid for the first accident as well as the second accident.

59. Moreover, this termination is well ***after*** I had already sent the demand for ***both*** accidents (which I emailed and mailed to the claimant), started negotiating the settlement for ***both*** cases, filed the Petition to Controvert on ***both*** cases (which was also mailed to the claimant), sent discovery on ***both*** cases, and all the other work that I did which is contained in the record in this matter.

60. In addition, if I did not represent the claimant, why is she faxing me her restrictions from Dr. Donnis Harrison on May 28, 2013?

61. Dr. Harrison treated McNair for the ***second*** injury. Thus, if I did not represent her on the second injury, why did she fax this to me?

62. I wanted to "highlight" just a few of the conversations and emails that I had with Ms. McNair about settling her second injury. For example, On May 31, 2013, I advised the claimant that since Dr. Winters told her she needed a "desk job" then the employer "can't accommodate her since it's been over 1 month since she took the restrictions to them." (C.P., Vol. II, p. 266). If I do not represent her on this second accident, then why are we having a conversation about the restrictions she received for it?

63. Another example is on June 24, 2013, the claimant and I were discussing the settlement demand and she told me that "she wants to get dr [Doctor] to put future med [medical]

care in writing BEFORE accepting any settlement. She will eb [email back] by tomorrow." (C.P., Vol. II, p. 267). If I do not represent her on this second accident, then why are we having a conversation about the future medical care she wants in writing from the doctor before accepting any settlement?

64. The Administrative Law Judge also found that Jay Foster's request that he be allowed to withdraw from both cases was "well taken" as Jay Foster was allowed to assert a lien "for legal services rendered." (C.P., Vol. I, p. 46). This Order was never appealed by the claimant. As a result, there is no question this Order remains the law of the case. *Stanley v. Allstate Ins. Co.*, 465 So. 2d 1023 (Miss. 1985).

The Claimant Is Bound By a Contract

It Is Undisputed That The Defendants Signed a Retainer Agreement With Jay Foster, P.L.L.C. And It Is Undisputed That The Claimant Is Charged With Knowing What She Signed

65. It is undisputed that McNair signed a retainer agreement with Jay Foster, P.L.L.C. First, a party is charged with knowing what they signed. McNair clearly signed a contract which provides that collection costs, including attorney's fees, are recoverable. This contract is clear and unambiguous. This Court has repeatedly held that contracts shall be enforced according to their terms. *State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Ins. Co.*, 797 So. 2d 981, 985 (Miss. 2001)*; Weeks v. Mississippi College*, 749 So. 2d 1082, 1087 (Miss. Ct. App.1999); *Allstate Ins. Co. v. Moulton*, 464 So. 2d 507, 510 (Miss. 1985).

66. Per the Encyclopedia of Mississippi Law, Chapter 76, Workers' Compensation Law, the filing of contract at the Mississippi Worker's Compensation Commissions is approval of the fee arrangement. *See* § 76:115. *Encyclopedia of Mississippi Law, Fees for Attorneys*

Representing Claimants.

67. Specifically, this Section states, "Unless the claimant objects, the filing of the attorney fee contract at the Commission and receipt of the form acknowledgment letter from the Commission are considered approval of the fee arrangement set forth in the attorney fee contract, subject to the fee limits established in Section 71-3-63."

68. Here, the contract for the second case was approved by the Commission on July 1, 2013. (C.P., Vol. II, p. 304) and (C.P., Vol I, p. 35-36). Obviously, this was long before the claimant fired me. There was no objection to the filing of this contract for the second case. In fact, no Motion was ever filed by the claimant regarding my attorney's fees for the second case. In fact, the claimant never objected to my attorney's fee until the bill came due (which is discussed subsequently in this brief).

69. Moreover, if I am not the attorney for Theresa McNair for the second case, then who was?

70. I filed the Petition, I filed the interrogatories, I filed the Request for Production of Documents, I filed the Request for Admissions. I received the Answer from the employer and carrier's lawyer. I negotiated the settlement. I received the correspondence and notices from the Mississippi Worker's Compensation Commission which stated that I was the "attorney of record" for the claimant. The claimant faxed me her doctor's restrictions on May 28, 2013, from Dr. Harrison for the ***second*** injury. I talked with and emailed the claimant about the second injury.

71. There simply is no one else but me representing the claimant. The claimant certainly was not representing herself as she did ***not*** file or respond to any of the legal matters that were filed in the second case.

Our Supreme Court Has Held A Party Is Bound By The Signed Contract

72. Next, Jay Foster would ask this Court to consider the written contract signed by McNair. It is clear and concise and specifically state the Claimant agrees to pay Jay Foster, P.L.L.C.'s expenses and attorney's fees for services rendered. Furthermore, since McNair signed the contract, McNair is bound by it. *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 725 (Miss. 2002) (citing *J.R. Watkins Co. v. Runnels*, 252 Miss. 87, 172 So. 2d 567, 571 (1965) ("A person cannot avoid a written contract which he has entered into on the ground that he did not read it or have it read to him.")); *Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co.*, 584 So. 2d 1254, 1257 (Miss. 1991).

73. Simply put, McNair is bound by the contract she signed. As such, McNair must pay Jay Foster, P.L.L.C.'s attorney's fees and costs based on the contract itself. But, as this Court has also held, even if there were no contract, Jay Foster, P.L.L.C. still gets paid for services rendered.

74. As a result, Jay Foster, P.L.L.C., respectfully submits that there is no question, based both upon the law and the facts, that it is entitled to be paid for attorney's fees and expenses on both cases.

The Mississippi Supreme Court Has Held That It Is Undisputed That The Retainer Agreement Is Enforceable

75. It is undisputed that the retainer agreement is enforceable. In fact, this Court has repeatedly held that contracts are enforceable, a person who signs a contract is charged with knowing what they signed, and any interpretation of the meaning of a contract is based upon what the contract says, not on what someone "may have meant or intended." Importantly, this Court has held this is true even in divorce and child custody matters

where the language in a Property Settlement and Child Support Agreement is much more complicated than the language in the retainer agreement in this case. *Ivison v. Ivison*, 762 So. 2d 329, 335 (Miss. 2000).

76. In fact, in *Ivison*, this Court cited with approval, a number of cases involving contracts and held, in pertinent part,

> When a contract is clear and unambiguous, this Court "is ***not*** concerned with what the parties may have meant or intended but rather what they said, for the language employed in a contract is the surest guide to what was intended." *Shaw v. Burchfield*, 481 So. 2d 247, 252 (Miss.1985). When this Court interprets a contract, we "look to the contract for its meaning, ***not*** what a party thereto may have thought it meant. The standard is objective, measured by the language of the contract, ***not*** by the subjective intent or belief of a party which conflicts with meaning ascertained by the objective standard." *Landry v. Moody Grishman Agency, Inc.*, 254 Miss. 363, 375, 181 So. 2d 134, 139 (1965). We are "concerned with what the contracting parties have said to each other, not some secret thought of one [that was] not communicated to the other." *Mississippi State Highway Comm'n v. Patterson Enters., Ltd.*, 627 So. 2d 261, 263 (Miss.1993).

Id. at 335 (emphasis added).

77. As a result, no matter what scenario McNair can devise in terms of what the claimant thought the retainer agreement said, or what the claimant thought the retainer agreement should have said, or what the claimant thought the retainer agreement meant, or some other scenario, the claimant is simply bound by the terms of the retainer agreement. As this Court can see, the retainer agreement specifically sets out that Jay Foster, P.L.L.C., will be paid by the hour for legal work performed. It sets out the hourly rate that will be charged. It sets out the retainer fee to be paid. It is clear, unambiguous and the Claimant must pay the legal bill in accordance with it.

78. Our Court of Appeals has held that “[p]arties obviously disagree over ... meaning, but that fact alone does not render ... instruments ambiguous." *Hynson v. Jeffries,* 697 So. 2d 792, 795 (Miss.Ct.App.1997) *quoting Whittington v. Whittington,* 608 So. 2d 1274, 1278

(Miss.1992)). Therefore, even if McNair could devise some scenario where she disagreed over the meaning of the contract, it does not mean the contract is ambiguous and as these cases also state, this means the contract must be enforced as written.

The Mississippi Constitution Prohibits Changing the Contract Terms

79. Article 3, Section 16 of the Mississippi Constitution prohibits the changing of the contract terms. This section provides that ex post facto laws or "laws impairing the obligation of contracts shall not be passed." Here, that is exactly what McNair is trying to do. The Claimant is attempting to have this Court change the terms of the contract so that she does not have to follow her legally obligated duty.

80. This Court has held this section of the constitution prohibits changing the terms of a contract. *In re Guardianship of Savell*, 876 So. 2d 308, 315 (Miss. 2004).

Assuming There Is No Written Contract, Quantum Meruit Requires Payment of Attorney's Fees

It Is Undisputed That The Mississippi Supreme Court Has Held That A Lawyer Must Be Paid For His/Her Bill Per Quantum Meruit - Even If It is for Someone the Lawyer Does Not Represent

81. Assuming McNair could get past the fact that she admitted that I represented her on both accidents, this still does not provide any relief for the claimant. Quantum meruit will apply which means I must be paid for services rendered even if there is no contract.

82. It is undisputed that this Court has repeatedly held that lawyers are entitled to be paid for legal services rendered per quantum meruit. For example, in *Panell v. Guess*, 671 So. 2d 1310, 1315 (Miss. 1996), this Court found that a lawyer was entitled to a contingency fee from the heirs that they did ***not*** even represent. In that case, the lawyer represented only the father and mother. The trial court said the lawyer gets a fee only from the father and

mother. On appeal, this Court reversed the case and held that the lawyer gets his fee from ***all*** the heirs and it can be determined on a quantum meruit basis or a contingency fee basis. *Id.* at 1315.

83. Therefore, even if this Court finds there was no contract, this Court has repeatedly ruled that a lawyer gets paid per quantum meruit, even if the lawyer did ***not*** represent the person.

84. The same is true in this case. Even if this Court finds that there was no contract, I still get paid per quantum meruit and the case above.

85. Obviously, McNair cannot complain that Jay Foster, P.L.L.C. is not entitled to a fee because the work was done and this is undisputed.

Lawyer Has No Written Contract - Lawyer Still Gets Paid Per Quantum Meruit

86. A lawyer who does not have a written contract still gets paid per quantum meruit. For example, *In re Estate of Stewart*, 732 So. 2d 255, 258 (Miss. 1999), this Court held that the law firm was entitled to attorney's fees for services rendered even though there was no written contract at all.

87. Thus, even if this Court finds there was no written contract (which the claimant agreed there was one per her letter to me discussed above), the claimant still must pay for services rendered per quantum meruit.

Lawyer Dies Before Representation Completed - Lawyer Still Gets Paid Per Quantum Meruit

88. Next, let us assume for the moment that a lawyer is representing a client and subsequently, the lawyer dies. Certainly, that would be a termination of representation by the lawyer because the lawyer is dead and it would obviously be of no fault to the client.

89. Yet, this Court would once again agree that the lawyer is entitled to a fee either on a

contingency and/or quantum meruit basis. In *Clifton v. Hood*, 36 So. 251 (Miss. 1904), this Court found that if a lawyer dies before the representation is completed, the client must still pay the lawyer or the lawyer's firm for services rendered.

Lawyer's Partner Steals Money from Client - Lawyer Still Gets Paid Per Quantum Meruit

90. Next, in *Duggins v. Guardianship of Washington*, 632 So. 2d 420 (Miss. 1993), this Court once again held that a lawyer is entitled to a fee for services rendered. In this case, Duggins was a lawyer. His law partner had stolen money from the guardianship.

91. Naturally, the guardianship sued Duggins himself and his law partner. This Court said this about Duggins, "his lack of action and attention allowed the guardianship to be victimized. Further, we sadly note that his efforts to date have been almost totally to protect himself financially with little attention to restoring or protecting the guardianship." *Id.* at 432.

92. Despite this Court's obvious dislike of Duggins, this Court still held, "the chancellor should consider an appropriate attorney's fee with which to compensate Duggins for his services." This Court further held, "a possible method for determining the appropriate amount of attorney's fees to which Duggins is entitled would be to compensate him on a quantum meruit basis." *Id.* at 431.

93. Thus, we have a lawyer that this Court obviously dislikes and thinks did a very poor job in his representation of the guardianship but this Court ***still*** held that he is entitled to a fee for services rendered per quantum meruit.

94. The same is true here. Even if, for some inexplicable reason, this Court was to find that Jay Foster, P.L.L.C., did a poor job (which is incorrect), or finds there was no written contract, I am still entitled to the entire fee for services rendered per quantum meruit.

Lawyer Represents Client for Legal Malpractice - Client Dies & *Wrong* Administratrix Was Appointed & Then Subsequently Removed - Lawyer Still Gets Paid Per Quantum Meruit

95. *In re Estate of Gillies*, 830 So. 2d 640, 642 (Miss. 2002), an inmate was beaten and hired the Langston Law Firm to represent him. The Langston Law Firm failed to file the lawsuit within the statute of limitations. The inmate died. *Id.*

96. John Gillis, an attorney, was hired to file a lawsuit against the Langston Law Firm. Subsequently, Gillis got the ***wrong*** administratrix appointed for the deceased inmate. The trial court removed the ***wrong*** administratrix. The trial court appointed someone else as the administratrix who Gillis did ***not*** represent. The Mississippi Supreme Court still held that Gillis gets paid per quantum meruit even though he ***never*** represented the correct heir of the deceased inmate. *Id.*

Lawyer's Contract is Void Because It is Illegal - Lawyer Still Gets Paid Per Quantum Meruit

97. Even if a lawyer's contract is void because it is illegal, this Court still has held that the lawyer must be paid per quantum meruit. For example, *in Ownby v. Prisock*, 243 Miss. 203, 207-08, 138 So. 2d 279, 280 (1962), the lawyer's contract was void because it was illegal. This Court held that lawyer still must be paid per quantum meruit. *Id.*

Construction Company Does Work Outside Written Contract Which Says All Changes Must be in Writing - Contractor Still Gets Paid Per Quantum Meruit

98. Moreover, the quantum meruit rule applies to all types of situations where an injustice would happen if a party was not paid.

99. For example, in *Tupelo Redevelopment Agency v. Gray Corp., Inc.*, 972 So. 2d 495, 514 (Miss. 2007), a case involving construction, the Court held, "Quantum meruit recovery is a contract remedy which may be premised either on ***express or implied*** contract, and a

prerequisite to establishing grounds for quantum meruit recovery is claimant's reasonable expectation of compensation." (Other cites omitted) (emphasis in original).

100. Thus, it does not give the claimant any relief from paying Foster's attorney's fees even if this Court finds there was no written contract. A contract remedy is premised on either an express or implied contract based upon all the work I did in this matter.

Construction Contract is Illegal - Contractor Still Gets Paid Per Quantum Meruit

101. In *Ground Control, LLC v. Capsco Indus., Inc.*, 120 So. 3d 365, 369 (Miss. 2013), this Court held that even though a contract was illegal, the contractor still gets paid for the work the contractor did per quantum meruit. *Id.*

102. Why? Because the work was done by the contractor and a party should not be able to profit at someone else's expense. This is the reason we have quantum meruit, equitable estoppel, and unjust enrichment.

103. Thus, even if this Court found that the work I did was wrong or illegal (which it was not), I still get paid per these rules.

No Contract for Property Improvement and Thus Statute of Frauds Should Bar Any Recovery - Person Who Improved Property *Still* Gets Paid Per Quantum Meruit

104. In *Koval v. Koval*, 576 So. 2d 134, 137 (Miss. 1991), "a property that was worth only $5,000 when the plaintiffs took it over and began to improve it is now valued between $24,500 and $35,000 due overwhelmingly to their efforts. Justice and fairness require that the defendants shall not be allowed to retain the property; or, if they are, then plaintiffs should be compensated for their work." *Id.* This was the ruling **even though** the statute of frauds would normally bar ***any*** recovery at all.

105. The same is true here.

106. I, Jay Foster, worked very hard on both of these cases. My work was known to the

claimant as I sent it to her by mail and by email and sometimes both. I also discussed both cases with her many times by telephone. All of this is proven by the pleadings filed with the Commission, the itemized bill filed with the Commission for both cases, and the emails and correspondence sent not only to the insurance company's lawyer but to the claimant.

107. I also brought the cases to a conclusion. The claimant simply cannot retain my attorney's fees for all the work I did simply by firing me from both cases. I must be properly compensated whether we call it equitable estoppel, unjust enrichment, and/or quantum meruit. Frankly, under any of these theories, the claimant must pay me for legal services rendered.

108. As this Court said in *Koval*, "These principles are based on justice, fair play, and the belief that a person should do what he says he will do in situations where another party is injured by reliance on the first party's representations. As this Court said in *PMZ Oil Co. v. Lucroy*, supra, it matters not whether the party making the statement intended to deceive the other party at the time the statement was made; rather, the test is whether it would be substantially unfair to allow a person to deny what he has previously induced another to believe and take action on." *Koval v. Koval*, 576 So. 2d 134, 138 (Miss. 1991).

109. Here, there is no question it would be substantially unfair. I did an enormous amount of work on the second injury. I negotiated the settlement for the second injury. Yet, now that the bill comes due, the claimant does not want to pay.

Black's Law Dictionary Demonstrates That I Must Be Paid for Legal Services Rendered

110. Black's Law Dictionary defines quantum meruit, in pertinent part, as "as much as

deserved" and "measures recovery under implied contract to pay compensation as the reasonable value of services rendered." *Id.*

111. The Mississippi Court of Appeals has cited Black's Law Dictionary as an authoritative source on quantum meruit and held, in *Reed v. Weathers Refrigeration & Air Conditioning, Inc.*, 759 So. 2d 521, 525 (Miss. Ct. App. 2000), "Black's Law Dictionary states the following about quantum meruit: *As equitable doctrine*, based on the concept that no one who benefits by the labor and materials of another should be unjustly enriched thereby; under those circumstances, the law implies a promise to pay a reasonable amount for the labor and materials furnished, even absent a specific contract therefor." (Other cites omitted) (emphasis in original).

112. Per the Mississippi Court of Appeals, in *Ace Pipe Cleaning, Inc. v. Hemphill Const. Co., Inc.*, 134 So. 3d 799, 805-06 (Miss. Ct. App. 2014), the elements of quantum meruit are: (1) valuable services were rendered or materials furnished; (2) for the person sought to be charged; (3) which services and materials were accepted by the person sought to be charged, used and enjoyed by him; and (4) under such circumstances as reasonably notified the person sought to be charged that [the] plaintiff, in performing such services, was expected to be paid by [the] person sought to be charged."

113. In *Ladner v. Manuel*, 744 So. 2d 390, 392 (Miss. Ct. App. 1999), the Mississippi Court of Appeals held, "Where there is a promise, either express or implied, to pay for services rendered, and the amount of the compensation is not agreed upon, the law will imply an obligation to pay on a quantum meruit. The measure of compensation is the reasonable value of materials and services rendered." (Other cites omitted).

114. Here, the first element is met as valuable services were rendered as I, Jay Foster, assisted the claimant with ***both*** worker's compensation accidents by advising her regarding legal

matters, payment of medical bills, medical care, medical treatment, maximum medical improvement, prepared a settlement demand, negotiated the settlement, reviewed medical records, and numerous other matters as demonstrated in attorney's fee bill. All of this is proven by the documents filed in the record.

115. Next, the second element was met as it was definitely for and on behalf of the claimant. I certainly did not do all this work for anyone other than the claimant.

116. The third element is also met as the services were accepted by the claimant and used by the claimant as she continually emailed and called me about ***both*** of her worker's compensation accidents. As a matter of fact, I advised the claimant that we should not settle the cases until her treating physician for her second accident put in writing all future medical care she would need so we could include this in the demand. McNair agreed with this recommendation. This is proven per the June 24, 2013, telephone call that I had with the claimant which is referenced in the itemized bill. (C.P., Vol. II, p. 267).

117. Moreover, all of this is also proven by the numerous contacts with McNair discussing her cases as reflected in the itemized bill and the documents filed with the Commission and sent to counsel opposite wherein I either sent to the claimant by mail, email, or both. In fact, as demonstrated above per McNair's letter to me, when McNair fired me, she fired me from ***both*** cases. If the claimant is not accepting my representation on ***both*** cases, then why is she firing me from ***both*** cases?

118. The fourth and final element of quantum meruit was also met. It says "under such circumstances as reasonably notified the person sought to be charged that [the] plaintiff, in performing such services, was expected to be paid by [the] person sought to be charged." Obviously, I am not representing the claimant for free. She obviously

understood this and that is why she fired me from both cases - because she thought she could avoid paying my attorney's fees if she did this.

119. Thus, even if this Court finds there was no written contract, the claimant is still required to pay for legal services rendered.

120. The itemized bill demonstrates that I performed an enormous amount of legal work on the claimant's case, all of which the claimant was aware as she received the documents either by mail or email and sometimes both. (C.P., Vol. II, p. 261-269).

121. On June 28, 2013, I prepared and filed the Petition to Controvert for the second injury. (C.P., Vol. I, p. 34).

122. On June 28, 2013, I prepared and filed the discovery for the second injury. (C.P., Vol. II, p. 278-279).

123. I faxed the discovery to the insurance carrier for the second injury on June 28, 2013. (C.P., Vol. II, p. 290).

124. I received the Answer from the employer and carrier's lawyer for the second injury. (C.P., Vol. I, p. 37-39).

125. I sent the settlement demand to the insurance company's lawyer and to the claimant for the second injury. (C.P., Vol. II, p. 234-237).

126. I sent and received multiple emails from the claimant regarding settlement of the second injury, medical treatment, medical care, future medical treatment, mmi date, physical therapy. (C.P., Vol. II, p. 261-269).

127. I had numerous telephone calls with the claimant about the second injury, which include, but are not limited to, the following: (a) medical care; (b) mmi; (c) medical bills; (d) getting the mri for her back because the carrier disapproved it at first; (e) discussions

about her injections in her back; (f) getting the treating physician to put in writing all the future medical care the claimant would need so we could include it in a settlement demand. All of this is proven by the emails and itemized bill. (C.P., Vol. II, p. 261-269).

Section 71-3-63 of the Mississippi Code

128. Section 71-3-63 of the Mississippi Code states, in pertinent part, "In ***all*** instances, fees shall be awarded on the basis of fairness to both attorney and client." (Emphasis Added).

129. The statute says in ***all*** instances attorney fees are awarded on the basis of fairness to both the attorney and the client.

130. It does not say "some." It does not say "partly." It does not say "maybe."

131. It says "all."

132. Why?

133. Because our Legislature obviously anticipated, as this Court also anticipated, that a client just might fire a lawyer when the bill comes due in an effort not to pay the lawyer.

134. And that's exactly what happened here.

135. This section of the statute prohibits such an attempt.

136. Moreover, by attempting to renege on paying me my attorney fees, the claimant is attempting to have this Court declare this portion of the statute unconstitutional.

137. This is a very heavy burden which the claimant cannot meet. *Finn v. State*, 978 So. 2d 1270, 1272 (Miss. 2008); *State v. Jones*, 726 So. 2d 572, 573-4 (Miss. 1998).

The Claimant Cannot Knowingly Accept the Services of a Lawyer and Object for the First Time When the Bill Comes Due

This Court Has Repeatedly Held That Lawyers Get Paid for Their Time

138. In *Franklin v. Franklin ex rel. Phillips*, 858 So. 2d 110, 120 (Miss. 2003), this Court held,

When a party accepts and uses the services of an attorney knowing that compensation is

expected, a contract will be implied for the payment of attorneys fees. *See, e.g., In re Estate of Stewart*, 732 So. 2d 255, 259 (Miss. 1999); *West Ctr. Apartments Ltd. v. Keyes*, 371 So. 2d 854, 858 (Miss. 1979); *Collins v. Schneider*, 187 Miss. 1, 192 So. 20, 23 (1939); *Jones Bayou Drainage Dist. v. Sillers, Clark & Sillers*, 129 Miss. 13, 91 So. 693, 694 (1922). A contract that arises from the conduct of the parties, also known as a contract implied in fact, has the same legal effect as an express contract. It carries as much weight as, and is as binding as an express contract. *Magnolia Fed. Sav. & Loan Ass'n v. Randal Craft Realty Co.*, 342 So. 2d 1308, 1312 (Miss. 1977); *Ahern v. South Buffalo Ry.*, 303 N.Y. 545, 104 N.E.2d 898 (1952), aff'd, 344 U.S. 367, 73 S.Ct. 340, 97 L.Ed. 395. Ct. 340, 344 U.S. 367, 73 S.Ct. 340, 97 L.Ed. 395 (1953); Restatement (Second) of Contracts§ 4 cmt.

Id.

139. Thus, this Court has recognized that quantum meruit ***will*** impose a contract even where none exists so that a lawyer gets paid for their time.

140. The same is true here. I did the work so I get paid regardless if there was a written contract or not. The law imposes a contract so that justice prevails.

141. Moreover, the *Franklin* Court cited as authoritative, *Old Men's Home v. Lee's Estate*, 191 Miss. 669, 4 So. 2d 235, 236 (1941), where this Court held, "that a quasi or constructive contract rests on the equitable principle that a person shall not be allowed to enrich himself at the expense of another. It is an obligation created by law, in the absence of an agreement, when and because the acts of the parties or others have placed in the possession of one person money under circumstances that in equity and good conscience he ought not to retain and which in justice and fairness belong to another. Furthermore, in *Cooke v. Adams*, 183 So. 2d 925 (Miss. 1966), this Court held that any conduct of one party from which the other party may draw the inference of a promise is effective as such and the conduct of the parties is viewed as a reasonable man would to determine the existence or not of the contract implied in fact." *Franklin* at 120-21.

142. As our Supreme Court held in *Franklin* over 75 years ago, "One cannot knowingly accept

the services of an attorney and ***object for the first time when the bill comes due***." *Franklin v. Franklin ex rel. Phillips*, 858 So. 2d 110, 121 (Miss. 2003) (citing *Stoner v. Yandell*, 188 So. 564 (Miss. 1939) (emphasis added)).

143. This is exactly what happened here.

144. I did not get fired from both cases ***until*** the bill came due.

145. In fact, no objection was raised to my representation in preparing and filing the Petition, preparing and filing discovery, preparing and sending the settlement demand, negotiating a settlement of both cases, advising the client about the legal ramifications of a second injury and other legal matters, advising the client about medical care, mmi, future medical care, and a litany of other matters related to the second accident.

146. It was ***only*** when the bill came due the client decided to fire me.

147. Fortunately, quantum meruit, equitable estoppel, and unjust enrichment, will not allow the client to get away with refusing to pay my attorney fees.

Conclusion

148. In summary, there simply is no way possible that McNair can get out of paying my attorney's fees for services rendered. There was a contract which was signed by all parties which should be enforced as written. Per the Encyclopedia of Mississippi Law, Chapter 76, Workers' Compensation Law, the filing of contract at the Mississippi Worker's Compensation Commissions is approval of the fee arrangement. The contract for the second case was filed with the Commission on July 1, 2013 and approved on July 1, 2013, by the Mississippi Worker's Compensation Commission. (C.P., Vol. I, p. 35-36 and C.P., Vol. II, p. 304). However, even if this Court finds there was not a written contract, this still does not provide the claimant with any relief. Under the doctrine of

quantum meruit, implied contract, equitable estoppel, or unjust enrichment, there is no question that I get my attorney's fees paid. The law imposes a contract which must be paid. Any other decision allows the claimant to unjustly benefit from my advice, time, and counsel for over two years for this second accident without having to pay me anything and is a violation of the law.

Respectfully submitted, December 28, 2014.

Jay Foster, Bar No. 9830

Certificate of Service

I certify that I have electronically filed a true and correct copy of the above and foregoing which sent this to all counsel of record and I mailed a copy to the claimant.

So certified, December 28, 2014.

S/Jay Foster
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